Filed 3/30/05 P. v. Fair CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES FAIR,

Defendant and Appellant.

F041994

(Super. Ct. No. SC084401A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Richard J. Oberholzer, Judge.

Curt R. Zimansky, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Lloyd G. Carter and Kelly C. Fincher, Deputy Attorneys General, for Plaintiff and Respondent.

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STATEMENT OF THE CASE

On July 3, 2002, the Kern County District Attorney filed an information in superior court charging appellant with being a felon in possession of a firearm (Pen.

Code,[1] § 12021, subd. (a)(1)) with two prior strike convictions (§§ 667, subds. (c)-(j), 1170.12, subds. (a)-(e)).

On July 8, 2002, appellant pleaded not guilty to the substantive offense and denied the special allegations.

On July 31, 2002, the court denied appellant's motion to suppress evidence seized during a June 13, 2002 search of his residence.

On August 22, 2002, appellant unsuccessfully moved for substitution of counsel pursuant to *People v. Marsden* (1970) 2 Cal.3d 118. On the same date the court granted appellant's request to bifurcate trial of the special allegations.

On August 26, 2002, a jury found appellant guilty of the substantive count and later that day found the prior strike allegations to be true.

On September 24, 2002, the court denied appellant's motion to suspend proceedings under Penal Code section 1368.

On October 16, 2002, the court denied appellant's motion to dismiss one prior strike based upon prohibited dual use of facts. However, the court struck one of the two strikes pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

The court then denied appellant probation and sentenced him to a total term of six years in state prison. The court imposed the upper term of three years on the substantive count and doubled that term under section 667, subdivision (e). The court imposed a $200 restitution fine (§ 1202.4, subd. (b)), imposed and suspended a second such fine pending successful completion of parole (§ 1202.45), and awarded appellant 188 days of custody credits.

On December 2, 2002, appellant filed a timely notice of appeal.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

On July 18, 2003 and September 29, 2003, this court granted appellant's applications for permission to obtain a settled statement and supplemental settled statement of proceedings regarding appellant's competency to stand trial (§ 1368).

STATEMENT OF FACTS

In early June 2002, Willie Jones took his unloaded handgun to appellant's home and asked him to hold it there for safekeeping. Jones had considered the situation an emergency and called the Kern County Sheriff's Department about his dilemma. The Sheriff's Department told Jones to get the gun out of his house. Jones placed the gun under his shirt and took it to appellant's home between 8:00 and 8:30 p.m. and explained the situation.

Jones told appellant he was having problems with his son, was afraid the gun would get stolen from his residence, and was also afraid it would be used to shoot Jones and his family. Jones asked appellant to keep the gun at his house for "safety" and said he would retrieve the weapon the following day or the day after that. Appellant agreed to keep the gun at his home, Jones handed him the weapon, and appellant put the gun in a closet.

According to Jones, he brought the gun to appellant because it was an emergency. He explained the Sheriff's Department came to his house quite often and deputies had told him to get the gun out of the house. Although Jones said he would be back to pick up the gun within several days, he became ill, went to the hospital, and was unable to retrieve the weapon. A day after he left the hospital, Jones went to appellant's home to get the gun but appellant was not there.

Theresa Shirley was appellant's girlfriend in June 2002. The two dated for about eight months. They did not live together, but Shirley sometimes traveled from her home in Colton and stayed with appellant. On June 13, 2002, appellant and Shirley had a fight. Later that day, she called Kern County Deputy Sheriff Lee Pesola and told him appellant had a gun in his closet. She said the gun was inside a black case in the hall closet where

she kept her clothes. The case was open and had a hole in it. Shirley did not know how long the gun had been in the closet but she first saw it at the end of May. Shirley said she never saw appellant handle the gun or the case. Shirley never touched the gun herself but may have moved it over while taking towels out of the closet.

At 5:40 p.m. on June 13, 2002, Deputy Pesola responded to a call at appellant's home. He spoke briefly with appellant and then spoke with Shirley at a nearby residence. Shirley told Pesola the appellant was an "ex-felon" who had a dark colored revolver. When Pesola returned to appellant's residence, he asked appellant if he had any weapons. Appellant said he only had a knife. Appellant gave Pesola permission to search his residence. Pesola opened the closet door and saw a black gun case on the floor of the closet. The deputy then found an unloaded blue steel revolver inside the case and placed appellant under arrest.

At trial, Deputy Pesola testified he was present at a July 31, 2002, hearing on appellant's motion to suppress evidence and heard appellant testify he had been convicted of assault with a deadly weapon in 1991.

On the morning of appellant's trial, Bakersfield Police Department Laboratory Technician Katherine Kibbey fingerprinted appellant and compared those prints with a certified copy of a set of prints contained in appellant's California Department of Corrections section 969(b) packet. Kibbey testified the two sets of fingerprints were identical. Under the term "offense," the fingerprint card listed a "245 .. assault with a deadly weapon."

The parties stipulated that Kern County Sheriff's Deputies would testify that a registration analysis conducted on the handgun in question revealed that it was registered to Willie Jones.

Defense

Appellant did not present any documentary or testimonial evidence but chose to rely on the state of the prosecution evidence.

Facts Relating to the Bifurcated Trial on the Prior Convictions

Following the verdict on the substantive count, the court conducted a jury trial on the prior strike allegations. Katherine Kibbey said the prosecution's documentary evidence showed that appellant had been convicted of assault with a deadly weapon and child molestation. With respect to both prior convictions, Kibbey testified that she rolled appellant's fingerprints earlier that day and compared the rolled set with fingerprint cards attached to the respective abstract of judgment for each prior conviction. Kibbey determined that both sets of fingerprints were identical to the set she had rolled on the morning of the instant trial.

DISCUSSION

I.

COMPETENCY HEARING

Appellant contends the trial court lacked jurisdiction to sentence him to state prison because he presented substantial evidence to show he was incompetent but the court refused to conduct a hearing under section 1368.

On September 19, 2002, between the time the jury rendered its verdict on the substantive count and the time of his sentencing, appellant's counsel filed a notice of motion and declaration of doubt as to appellant's competence under section 1368. On September 24, 2002, the trial court held an in camera hearing on the motion with only defense counsel and appellant present. At the hearing, defense counsel presented a September 21, 2002, confidential psychological evaluation prepared by Eugene T. Couture, Ph.D. of the Behavioral Healthcare Center of Bakersfield. Dr. Couture concluded appellant was not, at that time, competent to stand trial because he was not capable of cooperating with his attorney in building a rational defense.

Dr. Couture offered the following information in support of his forensic opinion:

> "***BACKGROUND INFORMATION*:** [¶]...[¶] Mr. Fair stated that his birth and early development were within normal limits, and he described himself as a healthy child. He stated that in 1989, he was shot in the head, with the

bullet entering the right forehead and exiting the right rear of the head on the same side. He was able to show me the defects for the entry and exit wounds. He stated that after he was shot, he was taken to Kern Medical Center, where he underwent brain surgery. He stated that he did have a craniotomy. He did not know the technical details of his surgery, but he believably described the operation. Thereafter, he was in the hospital for 6 days. He stated that he developed a seizure disorder. This disorder persists, and he is maintained on Dilantin, 400 mgs., 5 times a day. Even with that medication, he suffers breakthrough seizures once or twice a month. He stated that these seizures are generalized, that he does lose control, and has on occasion bit his tongue. He will have post-ictal confusion for an hour or two after the seizure. He stated that he has had continual memory problems since his injury. He also complained that he has had daily headaches of decreasing intensity, but still important, since the injury. He also complains of blurry vision. In addition to this injury, he suffers from high blood pressure, which is treated with medication. He has contracted tuberculosis which has been treated, and he has been released from treatment. He stated that he has always refused psychiatric medications, because 'they make my head hurt.' It should be noted that I was refused access to his medical records at the Pre-Trial Facility, and could not confirm through records, his description of his injuries. [¶]...[¶]

"***MENTAL STATUS EXAMINATION:*** [¶] Mr. Fair appeared for our interview as an English speaking, African-American male, who appeared about his stated age. He was well groomed and wore a goatee.... He is currently taking an unknown medication for hypertension, and was taking Dilantin for seizures; I was not allowed access to his records and do not know the dosage level, but he had taken them as prescribed within the previous 24 hours. These are long term medications, and he is used to their affects. He was oriented to person, place and time. He was alert. Cooperation was good, and rapport was well established. He stated that his mood was good, and his affect was normal and responsive. He denied any suicidal or homicidal ideation at any time in his life. He denied any fears, phobias or generalized anxieties, and there was no evidence of Post Traumatic Stress Disorder.... He denied any hallucinations or delusions, and there was no evidence of thought disorder. He had a certain amount of paranoia, particularly about the police, but this does not reach the level of a delusion. He stated that his appetite and libido were within normal limits. He stated that he becomes angry, 'if people turn on me.' He states that if he [becomes] angry, 'I usually tell them to get away--if they won't get away, I make them get away.'

"***BRIEF PSYCHOLOGICAL TESTING:*** [¶] Mr. Fair completed the Test of Non-Verbal Intelligence -3[rd] Edition (TONI-3), attaining an overall IQ

score of 65, which falls in the Mentally Retarded Range. While Mr. Fair never did learn to read, his language is much higher than that would be attained by a mentally retarded person, so this IQ score probably represents an acquired deficit in intellectual functioning. He also completed the Wide Range Achievement Test-3rd Edition (WRAT-3), Reading Subtest. His scaled score fell at less than 45, and at the Kindergarten level. He could read letters, but could read no words. This was consistent with his report of life-long illiteracy. [¶]...[¶]

"Mr. Fair then completed the Cognitive Status Examination. This is a multi-element screening test for neuropsychological dysfunction. He attained an overall score of 36, which is well into the Impaired Range. He displayed difficulty with both verbal and non-verbal memory, with some confabulation …. … There was a clear constructional dyspraxia, which is evidence of a neuropsychological dysfunction. He had difficulty with both visual analysis and visual synthesis. Motor speed was slow, and he was incapable of performing bilateral coordination tasks. These were again consistent with neuropsychological dysfunction. Interestingly, despite his motor problems, sensory tasks were performed well within normal limits. Mr. Fair's strengths are in the production and use of language, and in the perception of tactile sensation. He has important weaknesses in memory, reasoning, intellectual functioning, executive functioning, and visual-spatial skills.

"***FORENSIC INTERVIEW:*** [¶] Mr. Fair completed the Georgia Court Competency, MSH Revision, attaining an overall score of 74, which is in the Borderline to Competent Range. He has been to court and recalls his sessions in court. He can identify the individuals usually associated with the court. He seriously misunderstands the role of the jury and of the defense attorney. On the other hand, he does understand the role of the prosecutor. Mr. Fair is able to talk with his attorney and understands that he can use his attorney to challenge witnesses. He is, however, somewhat likely to challenge witnesses directly. He was aware that his attorney's name was Mr. Wakeman, and he has his card to get in touch with him. He was not aware of the formal charges against him, but admitted that he had been charged with 'having a gun in my house.' When I read the charges to him, he understood that he was charged with 'having a gun in my house and I've been to prison.' He is aware that he is facing 25 years to life, as under the Three Strikes Law. He was able to describe some of the events of the day of his arrest. Importantly, however, he is caught up in his lack of memory and his dementia in terms of forming an intent and having a reasonable understanding of the crime. On this basis, while he appears to understand, at least in part, the nature and purpose of the proceedings taken against him, it is my opinion that he can not cooperate with counsel in

building a rational defense, and is thus not competent to stand trial at this time. [¶]...[¶]

"***IMPRESSIONS AND RECOMMENDATION:*** [¶] James Fair is a 55 year old, African-American, English speaking male. He is currently charged with being a felon in possession of a handgun, and has apparently plead guilty to this charge in a previous hearing; I do not have the records regarding this. Mr. Fair was shot through the right forehead which exited the right rear of his skull in 1989. This has resulted in a persistent seizure disorder for which he is treated with Dilantin. I was not allowed access to his records, but he was able to show me the defects on his skull, and his description is believable. As a direct result of this gunshot wound, he appears to display serious dementia. He has clear deficits in memory, attention and concentration. His language is very good; language typically resides in the left side of the brain and in his case appears to be unaffected. On that basis, he sounds very good. His visual-spatial skills, motor coordination skills, speed of performance, and most importantly, his judgement [*sic*] and comprehension are severely impacted by the results of this gunshot wound. In my opinion, this has lead to the situation where Mr. Fair is not competent to cooperate with his attorney in building a rational defense. Part of this is due to the perseveration, confabulation, and lack of accurate memory regarding his history. This condition is of long standing and clearly would have existed at the time Mr. Fair plead to these charges and probably has not worsened or changed in the interim.

"The evaluation that I completed with Mr. Fair was a screening evaluation. He performed clearly in the range indicating Dementia, and I do not question my diagnosis. If, however, this is to be litigated further, I would suggest that a more detailed neuropsychological evaluation be under taken to more fully measure and determine his strengths and weaknesses. I would also suggest that his records be obtained through Kern Medical Center, and any concurrent records through the jail and other sources, to more fully understand his initial head injury and his ongoing seizure disorder."

At the in camera hearing on September 24, 2002, appellant's counsel, Teryl Wakeman, told the court that his client's ability to rationally cooperate with him had deteriorated significantly after the trial on September 4 and 5. Wakeman said appellant had accused him of misfeasance, had become incredibly upset and angry, and said "that he had the same jury on this case that he had with Art Titus on another case back in 1968 ...." Wakeman said appellant felt he did not have a fair trial, demanded the trial

transcripts, and made other demands that counsel could not meet. On September 5, appellant said Wakeman was going to hell and suggested "I should think about who was sitting next to me on the ride home as I was driving home from Lerdo." Wakeman informed the court he had tried in excess of 30 jury trials and never seen such anger and hostility in a criminal defendant. Wakeman also said appellant's communication on September 5 was irrational and "very, very poor." Wakeman also noted that appellant was very vocal during the trial on the priors and the jury was constantly looking at him.

When attorney Wakeman referred to Dr. Couture's report and suggested "the gunshot wound ... basically removed a large portion of the gray matter from the right side of his brain," the court responded:

> "The thing I saw in Dr. Couture's report, it is not talking about his competency. He may be talking about an issue of not guilty by reason of insanity, if that be what he's trying to promote here, but I don't see this being an issue of competency.
>
> "I don't know if Dr. Couture knows the difference between the two or not, but if you look at page five of his report ... says important, however, he has caught up in his lack of memory and [dementia] in forming an intent of having a reasonable understanding of the crime. [¶]...[¶]
>
> "Up further in that paragraph ... says Mr. Fair is able to talk with his attorney and understands that he can use his attorney to challenge witnesses. He, however, is somewhat likely to challenge witnesses directly. He didn't challenge anybody directly in this courtroom, as I recall."

When Wakeman said appellant challenged him "nonstop," the court noted, "You're his attorney. If I were your client, I'd probably want to try to get the best out of you that I could. [¶] I don't see anything that would indicate to the Court that he didn't understand the proceedings that were going on." Wakeman responded by saying the left side of appellant's brain--the side controlling language and speech--is intact while the right side--the side that affects comprehension--has been damaged by a gunshot wound and is very poor. When the court replied that it saw no problems during trial, attorney

Wakeman said appellant had deteriorated between the time of trial and sentencing.

Wakeman explained:

> "... [T]he time before the last time that I saw Mr. Fair, he told me that I was going to hell. He told me that I should pay attention to who was sitting in the car next to me on the ride home, that all of this was my fault and that – it didn't quite rise to the level of a threat, but it was certainly implicit, and based upon that I can't communicate with him about the sentencing. That's why I'm asking that the proceedings be suspended. [¶] I was going to ask the Court to appoint another doctor, specifically for a neuropsychological exam."
>
> The Court replied:
>
> "I don't know if a neuropsychological exam is going to help the Court with respect to 1368. 1368 is whether he understands these proceedings and whether he can cooperate with the attorney.
>
> "He's obviously displeased with the result of the trial. I guess I would be, too, if I was facing 25 years to life. That's what he's facing.
>
> "I don't think it's unusual for the client to get mad at an attorney. I think if you are going to continue to practice law, I think you have to understand that's part of the job.
>
> "I don't see anything here to suspend the proceedings under 1368. I see nothing in Dr. Couture's report that would indicate to the Court there is any problem there.
>
> "If you would like some more time to try to communicate with him, I'll continue it for that purpose, to see if you can get any communication, that whatever it is you want to submit – maybe you want to submit a ... 1385 request, to strike one of the strikes, whatever it might be, but I would suggest that you try to communicate with him. I think that's the job of an attorney, after you lose the case, is to try to get back and communicate with that individual. He's here."
>
> The court then engaged in the following exchange with appellant:
>
> "THE COURT: Mr. Fair, why do you not want to talk to your attorney?
>
> "THE DEFENDANT: Why should I?
>
> "THE COURT: Because he's representing you on this sentencing. You want representation on your sentencing. [¶] There are points that have to be

argued. In order to argue the points, he's going to have to discuss it with you.

"THE DEFENDANT: How can I go about letting him do this, Your Honor? [¶] Seem to me that you don't even understand what's going on. I don't know.

"THE COURT: Well, maybe that's true. I don't understand what's going on from the sense that you don't agree with your attorney in what he has requested here, but I think I do understand what's going on, but the point is, and you know what the point is, you know that you're coming up for sentencing now after a conviction. He's got to try to get the best possible sentence for you, and if he's going to do that then he's going to have to communicate with you about how to approach that issue. Do you agree with that?

"THE DEFENDANT: I don't know.

"THE COURT: What do you want, another attorney, is that what you're asking or what?

"THE DEFENDANT: I guess Mr. Wakeman doing what he supposed to be doing. I don't know. That's what I'm telling you, I don't know.

"THE COURT: Then I would suggest you sit down and talk with him so he can tell you what it is he's doing.

"THE DEFENDANT: What if I don't understand it anyway?

"THE COURT: You know what, Mr. Fair, I tend to believe just from your communications here that you do understand it.

"THE DEFENDANT: I don't think so. Lot of things – I don't know nothing about the law.

"THE COURT: Sit down and talk to him. He will tell you about it. He will help you to understand. [¶] Your request for that 1368 evaluation is denied."

Section 1368, subdivision (a) states:

"If, during the pendency of an action and prior to judgment, a doubt arises in the mind of the judge as to the mental competence of the defendant, he or she shall state that doubt in the record and inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent.... At the request of the defendant or his or her counsel or upon

its own motion, the court shall recess the proceedings for as long as may be reasonably necessary to permit counsel to confer with the defendant and to form an opinion as to the mental competence of the defendant at that point in time."

A person cannot be tried or adjudged to punishment while mentally incompetent. (§ 1367, subd. (a).) Trial of incompetent individuals infringes their due process guarantee, as well as other state and federal constitutional rights, including the rights to a fair trial, trial by jury, confrontation and cross-examination, presentation of a defense, effective assistance of counsel, equal protection, and reliable verdicts as guaranteed by the Fifth, Six, Eighth, and Fourteenth Amendments to the United States Constitution and their California counterparts, article I, sections 7, 15, and 17 of the California Constitution. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1063.)

A defendant is mentally incompetent if, as a result of a mental disorder or developmental disability, he or she is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner. When the accused presents substantial evidence of incompetence, due process requires that the trial court conduct a full competency hearing. Evidence is substantial if it raises a reasonable doubt about the defendant's competence to stand trial. When there exists substantial evidence of the accused's incompetency, a trial court must declare a doubt and hold a hearing pursuant to section 1368, even absent a request by either party. (*People v. Koontz, supra,* 27 Cal.4th at pp. 1063-1064.) However, a trial court's expression of preliminary concerns about competency does not require commencement of competency proceedings. (*People v. Danielson* (1992) 3 Cal.4th 691, 728, disapproved on another point in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

Thus, a defendant is constitutionally entitled to a hearing under section 1368 if he or she has come forward with substantial evidence of present mental incompetence. However, reviewing courts give great deference to a trial court's decision whether to hold a competency hearing. An appellate court is in no position to appraise a defendant's conduct in the trial court as indicating insanity, a calculated attempt to feign insanity, and

delay the proceedings or sheer temper. Moreover, defense counsel's opinion concerning his or her client's mental state is not conclusive. A trial court is not required to order a competency hearing based merely upon counsel's perception that his or her client may be incompetent. Although statements of counsel are to be given serious consideration, there is no good reason why it should control over other circumstances which the court may take into consideration. (*People v. Avila* (2004) 117 Cal.App.4th 771, 778-780.)

A defendant is presumed mentally competent to stand trial unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent. (§ 1369, subd. (f); *People v. Medina* (1990) 51 Cal.3d 870, 881-886.) Substantial evidence of incompetence is sufficient to require a full competency hearing even if the evidence is in conflict. The substantial evidence test is satisfied if a psychiatrist or qualified psychologist, who has had sufficient opportunity to examine the accused, states under oath with particularity that in his or her opinion the accused is, because of mental illness, incapable of understanding the purpose or nature of the criminal proceedings being taken or is incapable of assisting in his or her defense or cooperating with counsel. (*People v. Welch* (1999) 20 Cal.4th 701, 738.)

A court can only give such aid to intelligent appreciation of the proceeding as a sound discretion may suggest. Where the defendant suffers from a chronic condition causing pain and associated symptoms but he or she is lucid, coherent, and rational, the trial court is not obligated to suspend criminal proceedings. Rather, the proceedings are to be conducted in a manner that reasonably accommodates the special needs of the accused to the extent that this is practicable in light of courtroom security considerations and other legitimate constraints. (*People v. Avila, supra,* 117 Cal.App.4th at p. 781.)

Dr. Couture's report and opinion fell short of the substantial evidence standard in the instant case. Dr. Couture completed a screening evaluation on appellant but did not have access to the medical records relating to appellant's claimed head injury and seizure disorder. The report was based on the erroneous premise that appellant pled guilty to the

charged offenses, thus undermining many of the factual basis for the report. Moreover, the report indicated appellant understood the nature of the proceedings against him, the underlying charges, and the possible sentence he faced. Dr. Couture indicated that appellant was able to speak with his attorney and knew he could use him to challenge witnesses. Dr. Couture further noted that appellant's rating on the Georgia Court Competency Exam fell within the borderline to competent range.

During the hearing on appellant's motion, the trial court found Dr. Couture's findings and conclusions to be unpersuasive. The court had observed appellant during the trial and did not see or hear anything to raise a question as to appellant's competency. The court reasonably concluded that communication problems between attorney Wakeman and appellant were not the product of a mental impairment affecting appellant's ability to cooperate with counsel. Rather, the court determined appellant was refusing to cooperate with defense counsel because he was upset with him over the guilty verdict. An unwillingness to cooperate with defense counsel does not constitute proof of mental incompetence. The test in a section 1368 proceeding is a competency to cooperate and not cooperation itself. (*People v. Hightower* (1996) 41 Cal.App.4th 1108, 1111-1112.)

Finally, at the conclusion of the September 24, 2002 in camera hearing, appellant acknowledged, "I guess Mr. Wakeman doing what he supposed to be doing." Appellant also repeatedly said, "I don't know," and observed, "Lot of things – I don't know nothing about the law." At that point, the court encouraged appellant to sit down and talk to his counsel, observing, "He will tell you about it. He will help you to understand." From the entirety of the exchange, the court could reasonably determine that appellant did not know about the law of his case because he had not communicated with counsel and the lack of communication was attributable to appellant's anger over the verdict rather than some form of mental incompetency. More is required to raise a doubt of competence than mere bizarre actions, bizarre statements, or psychiatric testimony that a defendant is

immature, dangerous, psychopathic, or homicidal, or such diagnosis with little reference to defendant's ability to assist in his own defense. (*People v. Danielson, supra,* 3 Cal.4th at p. 727.) Here, the trial court observed appellant's demeanor and conduct throughout the trial and the September 24 in camera hearing and had ample opportunity to assess appellant's ability to understand the nature of the criminal proceedings and assist counsel at sentencing. In view of the rule of great deference to the trial court in such situations, the denial of appellant's section 1368 motion must be upheld.

II.

APPELLANT'S SUPPRESSION HEARING TESTIMONY

Appellant contends the trial court erroneously allowed the prosecution to use appellant's suppression hearing testimony in its case-in-chief as a way of proving that appellant was an ex-felon.

On July 24, 2002, appellant filed a motion to suppress evidence on the ground he had a legitimate expectation of privacy in the residence searched. On July 26, 2002, the prosecutor filed written opposition to the motion on the ground appellant consented to the search. On July 31, 2002, the court conducted a hearing on the motion and the following exchange occurred on direct examination of Deputy Pesola:

> "MR. NORRIS [deputy district attorney]: Q. What did she [Theresa Shirley] tell you?
>
> "A. [by Deputy Pesola] That he was an ex-felon.
>
> "Q. Did she tell you anything that he had in his possession that would be illegal for an ex-felon to have?
>
> "A. Yes, she said he had a gun in his possession.
>
> "Q. Did she tell you where the gun was?
>
> "A. Yes, she said it was in the hall closet in his apartment. [¶]...[¶]
>
> "Q. After he [appellant] consented to your searching the house, what did you do?

"A. I went to the hall closet where Theresa Shirley said the handgun was located. Upon opening the hall closet, I found a handgun in a black cover inside the closet."

The following exchange occurred on cross-examination of Deputy Pesola:

"Q. [by Deputy Public Defender Wakeman] You said that Miss Shirley told you that Mr. Fair was an ex-felon who had a gun. Were those her exact words?

"A. I don't believe those were her exact words.

"Q. Did she use the word felon?

"A. Ex-felon. [¶]...[¶]

"THE COURT: How did you confirm that he was a felon?

"THE WITNESS: Through my communications center, I had them check the database and they provided me with the information.

"THE COURT: And they told you he was a convicted felon?

"THE WITNESS: Yes, and a 290 registrant also.

"THE COURT: And at that point you arrested him?

"THE WITNESS: That's correct."

Appellant subsequently testified on his own behalf with respect to the motion. Prior to testifying on direct examination, the court determined that appellant understood his right to remain silent, the fact that anything he testified to could be used against him, and the fact the prosecutor could ask him questions on cross-examination. On cross-examination, the following exchange occurred:

"[Deputy District Attorney Norris]: Isn't it true, sir, that back in, I believe it was March of 1991, you were convicted of assault with a deadly weapon?

"MR. WAKEMAN: I'd object. Before you answer that question, I'd object it's beyond the scope of direct, and I think that any –

"THE COURT: Goes to impeachment. Prior moral turpitude, felony conviction, he can ask a witness about that. Goes to credibility.

"MR. WAKEMAN: But my concern is that I don't want him admitting to a three strikes prior.

"THE COURT: You're the one that put him on the witness stand, Mr. Wakeman.

"MR. WAKEMAN: That's true.

"THE COURT: He's allowed to impeach him with felony prior convictions.

"MR. WAKEMAN: Not as it's not for the truth of the matter. [¶]...[¶]

"THE COURT: Sir, Mr. Norris asked if you have suffered that prior conviction back in 1991; did you suffer that prior conviction?

"THE WITNESS: Yes, I have.

"THE COURT: Mr. Norris.

"MR. NORRIS: … Mr. Fair, isn't it also true that in, I believe March or April of 1987, you were convicted of child molestation as a felony? [¶]...[¶]

"A. Yes, I was convicted of it."

The court heard the arguments of counsel and denied appellant's motion to suppress. On August 22, 2002, the court conducted a hearing on motions in limine outside the presence of the jury. The People called Deputy Pesola to testify with respect to the various motions and the following exchange occurred:

"BY MR. NORRIS:

"Q. Did you – prior to speaking to him, had you contacted a woman by the name of Theresa Shirley?

"A. Yes.

"Q. Did she provide you with any sort of specific information regarding the defendant's criminal history?

"A. Yes.

"Q. What did she tell you?

"A. That he was an ex-felon.

"MR. WAKEMAN: Object, hearsay. [¶]...[¶]

"THE COURT: ... The objection was hearsay. It's not offered for the truth of the matter asserted, so I'm going [to] allow it to explain the subsequent actions of this witness."

On August 26, 2002, the following exchange occurred outside the presence of the jury:

"THE COURT: One of the things that the People have to prove is that you are a felon, that is that you have a prior felony conviction. In order to do that, they're going to attempt to bring in the records to show that you have a prior felony conviction, you have been convicted before of a felony.

"THE DEFENDANT: Yes, sir. [¶]...[¶] … They going to bring in the witnesses, too?

"THE COURT: They may not have to bring witnesses. They may have it all in documentation. I don't know. [¶]...[¶]

"Now, if you stipulate to the conviction and say, yeah, I'm just going to admit that I have a prior felony conviction, then the jury is going to know that you have a prior felony conviction, they will accept that, but they will not know what the prior conviction is, for what those charges were which you got convicted. [¶]...[¶]

"The People ordinarily have to prove that. Do you want the People to prove that?

"THE DEFENDANT: No. I give up the right. [¶]...[¶]

"THE COURT: You have the right against self-incrimination, which means you cannot be forced to make a statement against yourself. If you admit that you have a prior felony conviction, you are incriminating yourself, and you're eliminating the necessity for the People to prove one of the elements of the crime. Do you understand that?

"THE DEFENDANT: Yes, sir.

"THE COURT: Do you give up that right?

"THE DEFENDANT: Yes, your Honor. [¶]...[¶]

"THE COURT: Are you doing this freely and voluntarily?

"THE DEFENDANT: No, sir, because I don't know what I'm doing.

"THE COURT: Okay. I'm going to have the People prove – I think the People better prove this, Mr. Wakeman. I'm going to require the People to prove the prior conviction."

The following exchange occurred at trial during the direct examination of Deputy Pesola in the People's case-in-chief:

"[BY DEPUTY DISTRICT ATTORNEY NORRIS:]

"Q. Were you in court with this defendant this morning?

"A. Yes.

"Q. And did this defendant at some point admit suffering a prior felony conviction?

"MR. WAKEMAN: I'd object, hearsay, lack of foundation.

"THE COURT: Sustained. [¶]...[¶]

"BY MR. NORRIS:

"Q. Were you in court at another hearing a few weeks ago, on July 31st, 2002, in Department 10 of this courthouse.

"A. Yes.

"Q. And at that time did the defendant testify?

"A. Yes.

"Q. And on the witness stand did the defendant admit suffering a 1991 conviction for assault with a deadly weapon?

"MR. WAKEMAN: Objection, hearsay, lack of foundation.

"THE COURT: Well, I think probably the best evidence rule, also. [¶] Do you have the transcript?

"MR. NORRIS: I do, your Honor.

"THE COURT: That's what you should proceed on, an official transcript of the proceedings.

"MR. NORRIS: In that case, your Honor, I would ask the Court to take judicial notice of the contents of its own file. I have an original copy of that transcript. [¶] A copy has been provided to Mr. Wakeman. [¶]...[¶]

"THE CLERK: People's 3 marked for identification. [¶]...[¶]

"THE COURT: Any objection, Mr. Wakeman?

"MR. WAKEMAN: At the time I objected that it was beyond the scope of direct. It was allowed in for impeachment. I would submit to the Court that it's not then used for the truth of the matter asserted and, therefore, lacks foundation.

"THE COURT: Well ... whether the question was for the truth of the matter asserted, if it's a statement of admission against interest, that's how it comes in as an exception to the hearsay rule. I'm not sure I understand what you're saying.

"MR. WAKEMAN: Well, the hearing was a 1538, and Mr. Fair testified. And he was asked by Mr. Norris about his priors for the purposes of impeachment, and to the extent that my objection was overruled at that time, the objection at that time was beyond the scope of direct, and the Court, in response to my objection, stated that it went to impeachment....

"THE COURT: That is offered – I presume it was offered for the truth of the matter asserted?

"MR. WAKEMAN: Well, it was offered for impeachment.

"THE COURT: For the truth of the matter asserted?

"MR. WAKEMAN: Well, let me say this. If the Court's inclined to let it in, I would just ask that the record show an objection as to lack of foundation and hearsay.

"THE COURT: Lack of foundation as to the record?

"MR. WAKEMAN: Lack of foundation as to the prior.

"THE COURT: Lack of foundation as to the prior? [¶] It's being admitted as a statement against interests. I'm not sure I understand your objection. You're not objecting that this is not an official record?

"MR. WAKEMAN: No, not that.

"THE COURT: All right. I'm going to allow it."

The court subsequently received the People's exhibit No. 3A into evidence.

Appellant did not testify on his own behalf or present other testimonial or documentary evidence.

Appellant contends on appeal:

> "Section 12021, subdivision (a)(1), makes the prior conviction of a felony an element of the crime of being a felon in possession. The prosecution's duty is to prove the existence of each element of a crime beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358 . . ..) There are no mandatory presumptions in criminal law. (*Sandstrom v. Montana* (1979) 442 U.S. 510 ….) Therefore, it cannot be presumed that evidence that one was convicted of a felony on a certain date by a superior court is proof beyond a reasonable doubt that the conviction was not overturned on appeal. The evidence properly before the jury did not provide evidence beyond a reasonable doubt that appellant was a felon at the time he possessed the handgun sufficient to find the court's erroneous admission of appellant's § 1538.5 statement that he was a felon harmless. Therefore, appellant's conviction should be reversed and he should be granted a new trial. In this new trial the court should not admit appellant's § 1538.5 testimony that he was a felon, except to impeach appellant if he takes the stand."

Under article I, section 28 of the California Constitution, and *People v. Valentine* (1986) 42 Cal.3d 170, 173, a jury must be advised of a defendant's felon status when that status is an element of the current charge. When a defendant stipulates to his or her felon status, evidence of the nature of his or her prior convictions may and should be withheld from the jury because such evidence is irrelevant to the issue of one's status as a felon. (*People v. Stewart* (2004) 33 Cal.4th 425, 478.) When a criminal defendant testifies at a suppression hearing, his or her testimony may not be used at trial except for purposes of impeachment. This rule exists to permit a defendant to assert his Fourth Amendment right against unlawful searches and seizures without waiving his Fifth Amendment right against self-incrimination. The United States Supreme Court has interpreted these Amendments to permit a defendant to waive his or her right against self-incrimination and testify at his or her suppression hearing with the protection that such testimony cannot be used by the prosecution in its case-in-chief at trial. (*Simmons v. United States* (1968) 390 U.S. 377, 389-394.)

In the instant case, respondent concedes (a) appellant testified at the suppression hearing that he had been convicted of a felony; (b) appellant was charged with being a

convicted felon in possession of a firearm; (c) the prosecution offered the excerpt of transcript from the suppression hearing to prove an element of the crime, i.e., that appellant was a convicted felon; and (d) the trial court erred in admitting the evidence. Respondent nevertheless submits the error is harmless under *Chapman v. California* (1967) 386 U.S 18, 24.

Under *Chapman,* constitutional error is harmless when it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. The harmless error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence. Moreover, the doctrine promotes public respect for the criminal process by focusing on the underlying fairness of the trial. A reviewing court making this harmless error inquiry does not become a second jury to determine whether the defendant is guilty. Rather, an appellate court asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the matter at issue. If the answer to that question is "no," holding the error harmless does not reflect a denigration of the constitutional rights involved. Instead, it serves a useful purpose insofar as it blocks setting aside convictions for small errors or defects that have little likelihood of having changed the result of the trial. (*Neder v. United States* (1999) 527 U.S. 1, 15-19.)

In the instant case, Katherine Kibbey testified she had been a laboratory technician for the Bakersfield Police Department for 23 years and her duties included scene investigation, photography, and fingerprint analysis. Her training included the Federal Bureau of Investigation basic and advanced fingerprinting classes and advanced ridgology course. Kibbey said she was a member of the International Association for Identification, the California State Division of that group, and had been certified as a latent print examiner through that organization. Kibbey said she had examined fingerprints "a few thousand times" during her career with the Bakersfield Police

Department and had "rolled" appellant's prints (People's exh. No. 4) approximately one hour before testifying at his trial.

Kibbey compared those new fingerprints with a set included in a California Department of Corrections section 969, subdivision (b) packet (969(b) packet) bearing the name "James Fair." That packet indicated that one James Fair had been charged with assault with a deadly weapon under Penal Code section 245. Kibbey said she could not read the writing regarding the charge and could not tell whether Fair had been convicted of that offense. However, she did determine the fingerprints she rolled from appellant matched those included in the section 969(b) packet.

On appeal, respondent notes "the jury was able to compare the four mug shot type photographs in the 969(b) photographs and determine whether the person in those photographs was appellant." In reply, appellant acknowledges that a section 969(b) packet was admitted during the guilt portion of the bifurcated trial but that the court immediately redacted it "into Exhibit 5A an exhibit much shorter than Exhibit 5, the full packet."

Appellant correctly notes that exhibit 5A is much shorter than exhibit 5. Nevertheless, exhibit 5A includes a cover letter from the Department of Corrections, an abstract of judgment that reflects a one James Fair's conviction of assault with a deadly weapon, a fingerprint card, and four photographs of said Fair. Kibbey's testimony combined with the jury's review of People's exhibit 5A was sufficient to establish appellant's status as an ex-felon for purposes of the section 12021 allegation. Arrayed against such evidence, Deputy Pesola's oblique remark about appellant's testimony at the suppression did not contribute to the verdict obtained beyond a reasonable doubt.

In our view, the trial court's admission of appellant's inculpatory statement from the suppression hearing constituted harmless error and reversal is not required.

III.

REFUSAL TO STRIKE APPELLANT'S REMAINING PRIOR STRIKE

Appellant contends the trial court abused its discretion by refusing to dismiss his remaining prior strike in view of his dementia and the circumstances of the crime.

He specifically argues:

> "After his conviction for being a felon in possession of a gun (§ 12021, subd. (a)(1)) and the court's finding that appellant had suffered two prior strikes under the terms of the three strikes law (§§ 667, subds. (c)-(j) and 1170.12, subds. (a)-(e)), appellant requested that the court strike the strikes in the interests of justice pursuant to § 1385 and *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. The court granted the request in part by striking the most recent of appellant's strike convictions, his conviction for assault with a deadly weapon in 1991 (§245, subd. (a)(1)).
>
> "The court's reason for striking one of the priors was appellant's age, his mental condition, and the circumstances of the current offense. In determining the base term for the sentence, the court without objection found that there were no circumstances in mitigation and that in aggravation appellant (1) had numerous prior convictions as an adult, (2) served two prior prison terms, and (3) had prior performances on probation and parole that were unsatisfactory due to term violation and reoffending. Because of the existence of aggravating factors and the absence of mitigating factors, the court imposed the upper term of three years for the § 12021, subdivision (a)(1), violation, doubled because there was one strike, for a total term of six years. [¶]...[¶]
>
> "Appellant contends that it was an abuse of discretion for the trial judge not to take him wholly out of the three strikes scheme. The court abused its discretion even though it struck one of his strikes because its sentencing was not appropriate to appellant's specific condition, particularly his dementia. California Rules of Court, rule 4.323(b)(2), gives as a mitigating factor that '[t]he defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime.' Dr. Couture's report, the only evidence of appellant's mental health condition at the time he was sentenced, gives as a formal diagnosis that appellant suffered from '[d]ementia due to gun shot wound (294.1) moderate.'…
>
> "In appellant's case, Dr. Couture identified the source of appellant's moderate dementia as a head injury, specifically the through and through gunshot wound appellant received in the right side of his head in 1989. According to Dr. Couture, before the gunshot wound appellant was normal

functioning; after the gunshot wound he was demented. However, it is obvious from Dr. Couture's report that the dementia induced by the gunshot wound operated on an individual of limited abilities, particularly of limited education....

"According to the testing that Dr. Couture performed on appellant, and despite appellant's speech abilities, which mask his general mental condition, appellant now functions similar to a retarded person. His IQ is 65, which falls in the mentally retarded range, and represents an acquired deficit in mental functioning.... [T]he unschooled letters submitted in appellant's case strongly support ... Dr. Couture's report in that they state that he is mentally ill and has deteriorated since he was shot in the head. Several of them state that a mental health facility rather than a prison is the most appropriate place for him.

"In addition to appellant's moderate dementia and his mental retardation, factors which alone should take him entirely out of the three strikes scheme, appellant's crime almost certainly came about because of appellant's dementia and, therefore, was almost excusable. It was almost excusable because appellant's possession of the gun came about in an emergency when appellant was asked by a neighbor to hold the gun, which was unloaded, so that the gun would not be used in a shooting during a tense situation in the neighbor's household.… [¶]...[¶]

"... [A]ssuming Dr. Couture's report is correct, and it is the only psychological examination of appellant in the record, appellant's low mental functioning, particularly his moderate dementia affecting his memory and judgment, abilities situated in the part of appellant's brain through which the bullet passed, probably also strongly mitigate the circumstances of his crime. Indeed, the circumstances of his crime evidence no fewer than six of the nine crime mitigating factors set forth in California Rules of Court, rule 4.423(a). These factors are:

"(1) The defendant was a passive participant or played a minor role in the crime.

"(3) The crime was committed because of an unusual circumstance, such as great provocation, which is unlikely to recur.

"(4) The defendant participated in the crime under circumstances of coercion or duress, or the criminal conduct was partially excusable for some other reason not amounting to a defense.

"(5) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

> "(6) The defendant exercised caution to avoid harm to persons or damage to property, or the amounts of money or property taken were deliberately small, or no harm was done or threatened against the victim.
>
> "(7) The defendant believed that he or she had a claim or right to the property take[n], or for other reasons mistakenly believed that the conduct was legal. [¶] (California Rules of Court, rule 4.423(a).) [¶]...[¶]
>
> "The trial court's failure to strike appellant's remaining strike, thereby taking his sentencing out of the three strikes scheme entirely, is an abuse of the discretion the court has under § 1385 to strike strikes in the interests of justice. Appellant is not arguing that he deserves no punishment for his failure to obey the law, but he does believe that it is an abuse of discretion to impose the three strikes scheme on someone in his mental condition that illegally possessed an unloaded gun in the confused and confusing circumstances of this case." (Fn. omitted.)

On October 9, 2002, appellant filed a written request for the court to dismiss his "strike priors" under the three strikes law in furtherance of justice (§ 1385). Appellant noted (1) the trial court had discretion to strike his priors in the interest of justice; (2) he was the victim of a gunshot wound to the head, suffered from seizures, had suffered only two felony convictions prior to the instant one, and had no problems with the law since 1996; (3) there was "[a] lack of factors … pursuant to [California Rules of Court,] Rule 4.421" in his case; (4) his two strike priors "occurred a long time ago"; (5) the trial court could still impose a lengthy sentence if it struck his priors; and (6) the requested relief would not bar future prosecution under the three strikes law if appellant reoffended.

At the October 16, 2002, hearing on appellant's motion to strike priors, defense attorney Wakeman noted (1) the weapon, a pistol, was unloaded, placed in a case, and no ammunition was surrounding it; (2) the pistol was registered to Willie Jones; (3) appellant took the weapon in response to Jones's request to keep it temporarily; (4) the status offense was nonviolent; (5) appellant's prior felonies were old and his remaining criminal record consisted largely of public intoxication and driving under the influence offenses; (6) appellant had stayed out of trouble for the preceding six years; and (7) at the time of trial, he was 55 years of age and had endured a hard life.

In response, Deputy District Attorney Norris argued: (1) Willie Jones claimed he brought the gun to appellant's home the night before appellant's arrest, while Theresa Shirley indicated appellant had the weapon for several weeks; (2) appellant's 1991 conviction for assault with a deadly weapon involved his repeatedly striking a woman in the head with a pipe; (3) appellant's 1987 conviction for child molestation involved forcibly grabbing an eight-year-old girl and forcibly fondling her vagina, among other things; and (4) there was no mention of appellant's alleged mental difficulties until after he had been convicted of offenses carrying a 25-years-to-life penalty.

The court responded:

> "The question is what is the appropriate sentence based on the circumstances of this particular case, considering Romero and the strike priors.
>
> "It would appear to the Court as though 25 years to life, with respect to the defendant's age and his condition, may be a little harsh on the defendant from the standpoint that the crime itself not justifying 25 year to life, but certainly there has to be some accountability for the prior strike convictions under the law.
>
> "And so the Court, pursuant to Penal Code Section 1385, is going to strike one of the strikes. It's going to strike the Case Number SC044597A, which was the most recent strike, solely as a basis of imposing the appropriate sentence in this particular case, which would be clear to the Court – not striking as being improper in any way."

Section 1385, subdivision (a) states:

> "The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal must be set forth in an order entered upon the minutes. No dismissal shall be made for any cause which would be ground of demurrer to the accusatory pleading."

Under section 1385 a trial court has the power to dismiss or strike an enhancement. (*People v. Rivas* (2004) 119 Cal.App.4th 565, 571.) A defendant has no right to make such a motion and the trial court has no obligation to make a ruling under section 1385. However, a defendant does have a right to invite the court to exercise its

power by an application to strike a count or allegation of an accusatory pleading. If a defendant does so, the court must consider evidence offered by the defendant in support of his or her assertion that the dismissal would be in furtherance of justice. The judge may, either of his or her own motion or upon application of the prosecuting attorney, and in furtherance of justice, take such a step. Specifically, a trial court may strike or vacate an allegation or finding under the three strikes law that a defendant has previously been convicted of a serious and/or violent felony, on its own motion, in furtherance of justice pursuant to section 1385, subdivision (a). When the balance falls clearly in favor of the defendant, a trial court not only may but should exercise the powers granted by the Legislature and dismiss in the interests of justice. A trial court's refusal or failure to strike a prior conviction allegation under section 1385 is subject to review for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 373-376.)

In the instant case, the court concluded a sentence of 25 years to life in state prison was possibly "a little harsh on the defendant" in light of his age and condition. The court nevertheless noted "there has to be some accountability for the prior strike convictions under the law." The first of those prior strikes was a March 11, 1987 felony conviction (case No. SCO32816A) for lewd and lascivious conduct against a child under the age of 14 (§ 288, subd. (a)). Appellant was sentenced to the California Department of Corrections for a term of three years, was paroled on July 4, 1988, violated parole on July 5, 1989, and was paroled again on October 29, 1989. The prosecutor characterized that case as "disturbing." He argued, "In that case the defendant forcibly grabbed an eight year old girl. He forcibly fondled her vagina. He forcibly grabbed her wrist and forced her to masturbate him."

The second of those prior strikes was a March 19, 1991 felony conviction (case No. SC044597A) for assault with a deadly weapon (§ 245, subd. (a)(1)). The probation officer noted that appellant "struck female repeatedly w/20" pipe, causing bleeding from head & several small cuts." Appellant was sentenced to the California Department of

Corrections for a term of two years. He was paroled on February 7, 1992, violated parole on June 11, 1992, was paroled again on May 18, 1993, and violated parole on January 27, 1994. He was paroled again on February 18, 1994, violated parole on April 21, 1994, was paroled again on April 16, 1995, and violated parole on November 30, 1995. He was finally discharged from parole on February 7, 1996.

When the standard of review is abuse of discretion, our function is to determine whether the trial court's order was arbitrary or capricious, or exceeds the bounds of reason, all of the circumstances being considered. The burden is on the party attacking the order to show the decision was irrational or arbitrary. (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831.) The well-recognized purpose of the three strikes law is to provide increased punishment for current offenders who have previously committed violent or serious crimes and have therefore not been rehabilitated or deterred from further criminal activity as a result of their prior imprisonment. (*People v. Leng* (1999) 71 Cal.App.4th 1, 14.) Here, the trial court looked critically at appellant's record of prior strike convictions, evaluated them in light of his age and condition, and elected to strike his most recent prior felony conviction. Given the court's individualized consideration of appellant's background, nature of his present offense, and the facts underlying his priors, we cannot say the trial court acted arbitrarily or capriciously in ruling on appellant's section 1385 motion.

IV.

IMPOSITION OF THE UPPER TERM

Appellant contends the trial court violated his right to a jury trial under the Sixth Amendment of the United States Constitution by imposing the upper term for being a felon in possession of a firearm (§ 12021, subd. (a)(1)).

On August 30, 2004, appellant filed a supplemental written argument to challenge his upper term sentence. The argument stated in relevant part:

> "Although two prior convictions were found 'true' by a jury and the jury in convicting Mr. Fair of being a felon in possession of a firearm necessarily found that he was a felon, a jury did not find, and appellant did not admit, that his prior convictions were numerous, or that he had served two prior prison terms, or that his prior performance on probation and parole were unsatisfactory due to term violation and reoffending. As a consequence, Mr. Fair was denied his Sixth Amendment right to a jury trial and his Fifth and Fourteenth Amendment due process right to proof beyond a reasonable doubt of the aggravating factors utilized to impose a sentence greater than the statutory maximum of the 2-year middle term for a bare conviction of felon in possession of a firearm, doubled to 4 years under Penal Code section 667, subdivision (e), due to the prior strike. (U.S. Const., Amends. VI, XIV; *Blakely v. Washington* (No. 02-1632, June 24, 2004) ____ U.S. ____, 124 S.Ct. 2531 ...; *Apprendi v. New Jersey* (2000) 530 U.S 466; Pen. Code, § 1170 (b) [middle term mandated absent circumstances in aggravation or mitigation].)
>
> "Therefore, the sentence must be reversed and the trial court directed to impose not more than the middle term sentence of 2 years, doubled to 4 because of the strike. (U.S. Const., Amends. V and XIV—prohibition against double jeopardy.)" (Fn. omitted.)

On December 29, 2004, appellant filed a further supplemental letter brief, stating in relevant part:

> "After finding appellant guilty of being a felon in possession of a firearm (§ 12021, subd. (e)) the jury found it true that appellant had two prior convictions for serious and violent felonies. As a result, at the commencement of his sentencing hearing appellant faced a possible sentence of twenty-five years to life under the three strikes law. (§ 667, subdivisions (c)-(j) and § 1170.12, subdivisions (a)-(e).) However, the court exercised its discretion under Penal Code section 1385, subdivision (a), as interpreted by *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, to strike one of the prior felonies. It then sentenced appellant to a determinate term of six years, consisting of the upper term of three years for being a felon in possession of a firearm (§ 12021, subd. (a)(1)), doubled under the three strikes law (§ 667, subd. (e)(1) and § 117.12, subd. (c)(1)).
>
> "In sentencing appellant to the upper term for the possession of the firearm, the court cited the following factors: 'defendant's prior convictions as an adult are numerous, … defendant has served two prior prison terms ... defendant's prior performances on probation and parole were unsatisfactory due to term violation and reoffending.'

> "Because appellant was sentenced under the determinate term provisions of the three strikes law, i.e., under Penal Code sections 667, subdivision (e), and 1170.12, subdivision (c)(1), and because the factual findings that appellant's prior convictions were numerous, that he had served two prior prison terms, and that his prior performances on probation and parole were unsatisfactory were not determined by a jury and proved beyond a reasonable doubt, and because these findings resulted in a sentence greater than the statutory maximum under *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 ..., appellant's Sixth Amendment right to have a jury determine all the facts which are essential to his punishment was violated. (U.S. Const. 6th & 14th Amends.; Cal. Const., Art. I, §§ 7 & 16; *Blakely v. Washington* (2004) 542 U.S. _____ [124 S. Ct. 2531 ...]; *Apprendi v. New Jersey, supra,* 530 U.S. at p. 490.)" (Fns. omitted.)

In sum, appellant contends the court improperly imposed the upper term by using aggravating factors which were not found true beyond a reasonable doubt by the jury. This contention is based on the recent United States Supreme Court cases of *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] (*Blakely*), and *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*). In our view, the holdings in *Blakely* and *Apprendi* do not apply when the exercise of judicial discretion is kept within a sentencing range authorized by statute for the specific crime of which the defendant is convicted by jury.

In *Apprendi, supra,* 530 U.S. 466, the court held, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at p. 490.) In *Blakely,* the court explained that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (*Blakely, supra,* 542 U.S. at p. __ [124 S.Ct. at p. 2537].) In each case, state law established an ordinary sentencing range for the crime the defendant was convicted of committing, but allowed the court to impose a sentence in excess of that range if it determined the existence of specified facts not intrinsic to the crime. In each case, the United States Supreme Court held that a sentence in excess of the ordinary range was unconstitutional because it was based on

facts that were not admitted by the defendant or found true by the jury beyond a reasonable doubt.

Given this backdrop, we find California's determinate sentencing law constitutional and appellant's present sentence constitutionally permitted.[2] Under this state's determinate sentencing law, each applicable specific offense is given a sentencing range that includes lower, middle and upper terms. A defendant's right to a jury trial for that offense is with the understanding that the upper term is the maximum incarceration he may be required to serve if convicted of the specific offense for which he faces trial. Should the People allege enhancement charges, those are separately charged and the defendant is entitled to a jury's determination of the truth of such charges.

The language of the various rules and code sections applicable to selection of the base term work together to provide a system where after considering the entire record, the sentencing court may select any of three possible sentencing choices. (§ 1170, subd. (a).) This choice is discretionary and designed to tailor the sentence to the particular case. (*People v. Scott* (1994) 9 Cal.4th 331, 349.) The determination of the court's choice of term within the particular range allowed for a specific offense is determined after an evaluation of factors in mitigation and aggravation. These sentencing factors, consistent with the definition found in *Apprendi,* are weighed by the sentencing judge in determining the term of punishment within the specific offense's sentencing range. If there are no such factors or neither the aggravating nor mitigating factors preponderate, the court shall choose the middle term; additionally, the court retains the discretion to impose either the upper or middle term where it finds the upper term is justifiable.

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[2]The issue of *Blakely's* application to California's determinate sentencing scheme is currently before the California Supreme Court. (*People v. Towne,* review granted July 14, 2004, S125677; *People v. Black,* review granted July 28, 2004, S126182.)

(*People v. Thornton* (1985) 167 Cal.App.3d 72, 76-77.) A trial court has wide discretion in considering aggravating and mitigating factors. (*People v. Evans* (1983) 141 Cal.App.3d 1019, 1022.) Such an exercise of discretion does not violate the constitutional principles set forth in *Apprendi* and followed in *Blakely* because the court's discretion is exercised within the specific statutory range of sentence.

Our conclusion finds support in the recent amplification of *Apprendi* and *Blakely* in *United States v. Booker* (2005) 543 U.S. ___ [125 S.Ct. 738] (*Booker*). In *Booker*, the United States Supreme Court reversed the defendant's sentence under the federal sentencing guidelines and concluded that the guidelines were unconstitutional under *Apprendi* and *Blakely* if they were given mandatory effect. *Booker* reaffirmed the constitutional principle articulated in *Apprendi* and reaffirmed in *Blakely:* "Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." (*Booker, supra,* 543 U.S. at p. ___ [125 S.Ct. at p. 756] (maj. opn. of Stevens, J.).) The court held this principal applies to "sentencing factors" that serve to increase the applicable sentencing range prescribed by the federal sentencing guidelines because the guidelines "are mandatory and binding on all judges" and "have the force and effect of laws." (*Booker, supra,* 543 U.S. at p. ___ [125 S.Ct. at p. 750] (maj. opn. of Stevens, J.).) But the court reaffirmed the constitutionality of a discretionary sentencing scheme in which the sentencing court makes factual determinations in order to select a term from within a range of sentences:

> "If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. [Citations.]... For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems

relevant." (*Booker, supra,* 543 U.S. at p. ___ [125 S.Ct. at p. 750] (maj. opn. of Stevens, J.).)

California's determinate sentencing law requires the trial court to exercise its discretion to select from a range of three possible sentences. The California Rules of Court provide guidance by enumerating facts relevant to the sentencing decision, but they do not make any particular sentence mandatory assuming such facts are found. Section 1170, subdivision (b) simply precludes the imposition of an upper term sentence where there are no factors in aggravation, a provision which operates in the defendant's favor and does not increase the statutory maximum for a particular crime.

As set forth *ante*, the trial court herein selected the upper term based upon its analysis of sentencing factors. This choice of term was within the statutory range allowed for the specific offense of being a felon in possession of a firearm in violation of section 12021, subdivision (a)(1). Moreover, the court's decision to double the upper term as the appropriate second strike sentence also did not violate *Blakely* because it was based on the jury's specific finding of a prior strike conviction. No constitutional violation occurred.

Even if the court's inclusion of circumstances in aggravation as to the offense were not constitutionally allowable, the court herein stated its choice of the upper term because of aggravating factors which included appellant's prior record of convictions. As *Apprendi* states, and *Blakely* agrees, prior recidivist conduct may be used by a sentencing judge, even absent a jury finding, to increase a defendant's term. (*Apprendi, supra,* 530 U.S. at pp. 488, 490; *Blakely, supra,* 542 U.S. at p. ___ [124 S.Ct. at p. 2536].) "*Apprendi* was absolutely clear in excepting the fact of prior convictions from its new rule." (*Thompson v. Superior Court* (2001) 91 Cal.App.4th 144, 154.) This prior-conviction exception to *Apprendi* has been construed broadly to apply not only to the fact of the prior convictions, but also to other issues relating to the defendant's recidivism, including the defendant's status as a probationer or parolee at the time the current offense was committed. (See *People v. Thomas* (2001) 91 Cal.App.4th 212, 216-223.)

As *Apprendi* states, and *Blakely* agrees, prior recidivist conduct may be used by a sentencing judge, even absent a jury finding, to increase a defendant's term. (*Apprendi*, *supra,* 530 U.S. at p. 488.) Under California law, a single factor in aggravation is sufficient to support the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 730.) The trial court did not violate the principles of *Blakely* by imposing the longest of three terms permitted by law for a violation of section 12021, subdivision (a)(1).

DISPOSITION

The judgment is affirmed.

_____
HARRIS, J.

I CONCUR:

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VARTABEDIAN, Acting P.J.

DAWSON, J.

I concur in the result, and in the reasoning of the majority opinion except to the extent that it suggests that the *Almendarez-Torres*[1] exception to the rule of *Apprendi*[2] and *Blakely*[3] extends beyond finding the fact of a prior conviction to finding "other issues relating to the defendant's recidivism …." (Maj. opn., *ante*, p. 35.) I do not believe such extension of the *Almendarez-Torres* exception is appropriate. (See *Shepard v. United States* (Mar. 7, 2005, No. 03-9168) ___ U.S. __ [2005 U.S. LEXIS 2205 at pp. *22-*25]; see *id.* at p. __ [2005 U.S. LEXIS 2205 at pp. *26-*27] (conc. opn. of Thomas, J.). I concur, however, because I agree with the majority that the presumptive nature of California's sentencing scheme (see Pen. Code, § 1170, subd. (b)) does not bring the scheme within the ambit of the *Apprendi/Blakely* rule.

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DAWSON, J.

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[1] *Almendarez-Torres v. United States* (1998) 523 U.S. 224.

[2] *Apprendi v. New Jersey* (2000) 530 U.S. 466.

[3] *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531].